Nos. 16-1436 & 16A1190

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IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
Applicants,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROGRAM, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF

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RULE

S. Ct. Rule 15.8 1

Pursuant to Supreme Court Rule 15.8, the respondents respectfully submit this supplemental brief to inform the Court about new developments since their last filing.[1] The decision of the U.S. Court of Appeals for the Ninth Circuit in *Hawai'i v. Trump* means that the government may now proceed with its review of vetting procedures under Section 2 of Executive Order 13780, 82 Fed. Reg. 13209 (the "Order"). *Hawai'i v. Trump*, ___ F.3d ___, 2017 WL 2529640, at *28-29 (9th Cir. June 12, 2017), *appl. for stay docketed*, No. 16A1191. And the President's June 14 Memorandum establishes separate effective dates for different provisions of the Order, thus severing the Section 2(c) ban from the vetting review that it ostensibly facilitated. Presidential Mem., *Effective Date in Exec. Order 13780* (June 14, 2017) (the "Memorandum").

Together, these developments make the facial illegitimacy of the Order and its inconsistency with the Immigration and Nationality Act even clearer. They negate the Order's own justification for the 90-day ban in Section 2(c), as a "temporary pause" *concurrent* with the review process, instead reinforcing the conclusion that Section 2(c)'s actual purpose is to disfavor Muslims. And because the review process will now proceed, the argument that the Court should intervene is even weaker. By October, the review will be complete, and the asserted purpose for the Section 2(c) ban will no longer exist at all. Moreover, the Order contemplates that the government may put into place a different set of measures after completing its review.

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[1] The government addressed these developments in its reply papers. *See* Cert. Reply 2; Stay Reply 1-2, 6 n.3.

Therefore, the government's request for certiorari is clearly premature. Different, more permanent measures may be in place before the new Term; those new measures may or may not include a ban; and if they do include a ban, it may be substantially different from the Section 2(c) ban. The new measures, if challenged, would be more suitable for this Court's review. Certiorari should be denied here, and so should the government's extraordinary request for a stay that would allow it to implement the entire 90-day ban without merits review.

STATEMENT

On June 12, 2017, after the respondents had sent their brief in opposition to the printer, the Ninth Circuit issued its decision in *Hawai'i v. Trump*.[2] In a per curiam opinion, the Ninth Circuit affirmed on statutory grounds a preliminary injunction of the Section 2(c) 90-day six-country ban, the Section 6(a) 120-day refugee ban, and the Section 6(b) reduction in refugee admissions, without reaching the plaintiffs' Establishment Clause claims. *See Hawai'i*, 2017 WL 2529640, at *13-23; *see also* Opp. Cert. 34-36 (explaining that Section 2(c) violates the Immigration and Nationality Act).

More importantly for present purposes, the Ninth Circuit lifted the injunction of Section 2's review and reporting provisions. *See Hawai'i*, 2017 WL 2529640, at *29. Those provisions mandate a 70-day review process, *see* Order §§ 2(a), 2(b) (20 days),

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[2] Respondents briefly addressed the *Hawai'i* opinion in their opposition to the government's stay application, which was finalized soon after the Ninth Circuit issued its decision. *See* Opp. Stay 16.

2(d) (50 days), followed by a prompt recommendation to the President regarding any action after the review, *id.* § 2(e). On June 13, the government filed a consent motion in *Hawai'i* requesting that the court of appeals immediately issue the mandate so that the "government may then implement" the review provisions of the Executive Order. Consent Mot. to Issue Mandate 3-4, Doc. 316, *Hawai'i v. Trump*, No. 17-15589 (9th Cir. filed June 13, 2017). On June 19, the Ninth Circuit granted that motion and ordered that the mandate issue immediately.

Meanwhile, on June 14, the President issued the Memorandum, revising the Order's effective date, as to each individual provision, from "March 16, 2017," Order § 14, to "the date and time at which the [preliminary] injunctions are lifted or stayed with respect to that provision." Thus, according to the Memorandum, every provision that was initially enjoined may go into effect separately, if and when the injunctions as to that provision are lifted—and without regard to the status of any other provision.

ARGUMENT

1. These developments undermine any claim that Section 2(c) is facially legitimate or consistent with 8 U.S.C. § 1182(f). Section 2's text binds the Section 2(c) ban to the Section 2 review process. *See* Order § 2, titled "Temporary Suspension of Entry . . . *During Review Period*" (emphasis added); *id.* § 2(c) (purpose of 90-day ban is "[t]o temporarily reduce investigative burdens on relevant agencies during the review period . . . ."). Similarly, the government's asserted secular purpose for the ban rests on the claim that it is a "temporary pause" to allow the review of vetting procedures. Order

§ 1(f); *see also, e.g.*, *id.* §§ 2(a), (b) (stating that Section 2's purpose is a "worldwide review"); Pet. 7 (observing that Section 2(c) exists "to facilitate [that] review"); Supp. Mem., *Trump v. Hawai'i*, No. 16A1191, at 16-17 (filed July 15, 2017) (same).

What Section 2's text originally purported to connect, the Memorandum has now explicitly severed. The Memorandum treats each "provision" in Section 2 as an end in itself, and provides that each may have its own effective date, irrespective of the effective dates of other provisions. As amended by the Memorandum ("[t]o the extent it is necessary, this memorandum should be construed to amend the [Order]"), the 90-day ban can no longer be expected to run concurrently with the review process, and therefore cannot be explained either by the need to free up agency resources for the review process or to "pause" entries while uncertainty about these nationals or countries is addressed through the review—the only reasons the government has ever given for this extraordinary and unprecedented 90-day ban. In short, the Memorandum cuts the legs out from under the Order's own justification for the ban. *See also* Opp. Cert. 23 n.13 & 34-36 (providing other reasons the ban is not "facially legitimate" and does not comply with the statute).

2. As a practical matter, the 70-day review process laid out by Section 2 will begin immediately, and will be complete by the beginning of the Court's next Term.[3] Thus, even if the government still asserts that the ban serves the review process (notwithstanding the President's decision to sever

[3] A similar review process established by Section 6 will be complete by the end of October. *See* Order § 6(a).

them), the review process will be over by October, and the asserted reason for the 90-day ban imposed by Section 2(c) will no longer exist. *See* Opp. Stay 16 (noting the possibility that the review provisions could be reinstated and explaining that the completion of that process would vitiate the asserted need for the 90-day ban). The government's insistence on implementing the ban even in these circumstances is inconsistent with the purposes stated in the Order and in the government's papers—but is consistent with the President's clearly and repeatedly stated goal of preventing Muslims from entering the United States.

3. After the review is complete, the Order expressly contemplates that, in place of the expiring 90-day ban, the government may implement more-permanent measures affecting the currently-listed countries or other countries—or may decide not to impose any ban at all. *See* Order §§ 2(e) (contemplating a potential new presidential proclamation imposing further travel restrictions), 2(f) (same). What is before the Court now, therefore, is a request to review a temporary ban provision that, even by the government's telling, will be overtaken by events by the time the Court hears oral argument.

If, after the review is complete, the government decides not to impose further travel restrictions, the 90-day ban at issue here will be a pointless relic of prior circumstances, and will not require review. And if the government does take more-permanent actions after that process ends, *see* Order §§ 2(e), (f), the Court can review any challenges to those actions in due course, after the lower courts have addressed them in the first

instance. *See, e.g.*, *NCAA v. Smith*, 525 U.S. 459, 470 (1999) (declining to "decide in the first instance issues not decided below").

Moreover, this case is on interlocutory appeal from a preliminary injunction. There is no circuit split to resolve. And, as the lower courts have repeatedly observed, the case is truly unique. App. 61a-62a; 252a. No case in our history involves an even remotely similar factual record, and the court of appeals' decision applying this Court's precedent to this unique set of facts does not restrict this or any future President's legitimate exercise of his or her extensive national security powers in any way. *See* Opp. Cert. 15, 20-29. There is no reason for this Court to grant certiorari.

4. Finally, these developments weaken the government's case for a stay even further. They seriously undermine the government's position on the merits and its likelihood of obtaining certiorari. And by clarifying that the 90-day Section 2(c) ban is tied neither to the review nor to circumstances in any particular 90-day period, they further underscore that the government will suffer no injury from not being allowed to implement the ban *now*. The lack of any such injury is particularly striking here, where a stay would effectively short-circuit the merits by allowing the government to execute the entire 90-day ban before this case will be argued and decided. *See* Opp. Stay 19-20; *accord* Stay Reply 13 (not disputing that stay would have that effect).[4]

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[4] Should the Court grant the petitions for certiorari in this case and the *Hawai'i* case, the respondents concur with the government that the cases should be heard in tandem, rather than consolidated. The two cases involve differently situated

Respectfully Submitted,

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plaintiffs, and the courts of appeals relied on different grounds and granted different relief.

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